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No. 372

In the Supreme Court of the United States

VIEW CREST GARDEN APARTMENTS, INC., a corporation, et al, *Petitioners*

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LYCETTE, DIAMOND & SYLVESTER
and LYLE L. IVERSEN,
Attorneys for Petitioners.

Office and Post Office Address:
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FRAYN LETTERPRESS

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In the Supreme Court of the United States

VIEW CREST GARDEN APARTMENTS, INC., a corporation, et al, *Petitioners*

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum opinion of the trial court (Tr. 53-55) is not contained in official reports. The opinion of the Court of Appeals (Apendix A, infra, pp. 1A to 7A) is not yet reported in the official Federal reports.

JURISDICTION

The jurisdiction of the court is invoked under

Title 28, United States Code, Section 1254 (1). The judgment of the court below was entered on June 22, 1959 (Appendix A, infra, pp. 1A-7A). This petition is filed within ninety (90) days following said date.

STATUTES INVOLVED

Statutes pertinent to the consideration of this application are Title 12, U. S. Code, Section 1707 which is set out in Appendix B herein. Title 12, Section 1750 of the U. S. Code is set out in Appendix C. Section 7.28.230 of the Revised Code of Washington set out in Appendix D hereto.

QUESTION PRESENTED

In the foreclosure of a mortgage insured by the Federal Housing Administration may state law be disregarded in the determination of whether rents and *profits accruing prior to foreclosure* may be impounded by a receiver and applied on the mortgage indebtedness.

STATEMENT OF THE CASE

This is an interlocutory appeal in a mortgage foreclosure case. The facts as found by the court below (Appendix A, infra, pp. 1A-7A) may be summarized as follows: View Crest Garden Apartments, Inc., borrowed money from the National Bank of Commerce of Seattle. A mortgage was executed by View Crest Garden Apartments, Inc., as mortgagor, to the bank as mortgagee, pledging the real property of mortgagor, *together with the rents and profits* therefrom. Mortgage insurance was agreed to by the Federal Housing Insurance Authority. The mortgage form used was a printed one formulated by the FHA and contained a provision to the effect that in the event of foreclosure a receiver was to be appointed in order to collect rents which were to

be applied as additional payment of the debt. A number of notes also on printed forms, furnished by the FHA, were executed to secure each installment to be paid. A default occurred but was cured by a modification of the agreement between View Crest Gardens Apartments, Inc. and the FHA, the bank having previously assigned the mortgage to the Federal National Mortgage Association which in turn assigned it to the Federal Housing Administration. A second default occurred on March 15, 1958 whereupon the United States instituted this foreclosure action and in its complaint for foreclosure prayed for the appointment of a receiver to take over the assets and collect the rents. A hearing was had on the application for the appointment of a receiver. The court denied the application on the ground that inasmuch as the State law of Washington applied, no sufficient showing had been made under the law of the State to warrant such an appointment. It is conceded that under the law of the State of Washington the trial court was correct (Tr. 65), inasmuch as a statute of the State of Washington provides:

> "A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law." Section 7.28.230, Revised Code of Washington.

That section has been interpreted by the Washington courts as rendering contrary to public policy and void, any agreement to include the rents and profits as a part of the mortgage security for a loan (Tr. 54), *Peoples Savings and Loan Association v. Smith,* 174 Wash. 289, 24 P. (2d) 644.

The order of the District Court stated (Tr. 51):

> "* * * and the court being now of the opinion that this order involves a controlling question of law as to which there is a substantial ground for difference of opinion and further that an immediate appeal from said order may materially advance the ultimate termination of the subject litigation * * *."

Upon the basis of that certification the Ninth Circuit Court of Appeals entertained an interlocutory appeal pursuant to Section 1292b of Title 28, U. S. Code (Tr. 60) and this action was before the Circuit Court of Appeals upon the sole issue of the refusal of the court to appoint a receiver of rents from the mortgaged property during foreclosure (Tr. 61). The Circuit Court of Appeals held (Tr. 65) that the court was in error on applying State law and said (Tr. 65):

> "In reaching our conclusion we have found that in this case as in others with which we have struggled this solution is not without difficulty."

The action of the court was to determine that with respect to federally insured mortgages, State law has no application, and to order the case be remanded with instructions to the trial court to make a determination as a matter of federal law whether the facts warrant the appointment of a receiver (Tr. 68).

SUMMARY OF ARGUMENT

This is a matter of general importance affecting the rights of all mortgagors under federally insured mortgages including those under G. I. and Federal Housing Administration insurance in that the decision below would drastically alter the *rules of*

property heretofore thought to be established under state law for the protection of mortgagors and the federal courts would be required to establish a *new* system of federal law, not heretofore evolved, with respect to the rights of mortgagors under insured mortgages. This court has not heretofore passed upon this subject and the principles applied in arriving at the decision of the Circuit Court of Appeals are in conflict with those applied in comparable cases by the courts of other circuits.

REASONS FOR GRANTING THE WRIT

The decision of the Circuit Court in this case has drastic implications. This decision changes the incidents and nature of all of the thousands of insured mortgages under the Federal Housing Administration and similar programs in that it makes no longer applicable to insured mortgages either the statutory or common law of the states establishing protections for mortgage debtors and calls upon the federal courts to now evolve an independent federal common law to govern such mortgages.

The decision of the Circuit Court of Appeals conflicts with decisions of this court to the effect that with respect to rules of property federal courts will look to the state law. *Brine v. Hartford Fire Insurance Co.*, 96 U. S. 627, 24 L. Ed. 858.

There is no federal statute defining generally the nature and incidents of a mortgage, but Congress has in Section 1707 of Title 12, U.S.C. defined the term "Mortgage" for the purposes of the Federal Housing Administration Act as follows:

> "*As used in Section* 1709 *of this title*—(a) the term 'mortgage' means a first mortgage on real estate, in fee simple, or on a leasehold (1)

under a lease for not less than ninety-nine years which is renewable or (2) under a lease having a period of not less than fifty years to run from the date the mortgage was executed; and the term 'first mortgage' means such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate, *under the laws of the state, in which the real estate is located, together with the credit instruments, if any, secured thereby.*" (Emphasis supplied.)

It will be noted that Congress has stated that a mortgage shall be the classes of first liens commonly given to secure advances on, or the unpaid purchase price of real estate under the laws *of the state* in which the real estate is located.

The nature of the lien of a *mortgage varies from* state to state. In some states a mortgage can carry with it title and the right to possession by the mortgagee and the right to pledge the rents and profits, 36 Am. Jur. 709, but in other states the lien of a mortgage extends only to the property itself. Anno. 26 A.L.R. 33. Mortgagors have traditionally been regarded as dealing upon less than an equal basis and hence a body of law has grown up to protect them. States have accomplished this by both statutes and decisions. The principle that the mortgagor may not validly pledge the rents and profits or contract to yield up possession prior to foreclosure is among such policies accepted in some, but not all of the states. The rights of homestead and redemption are other features of this body of law which varies from state to state. Such principles have regularly been recognized by Federal Courts. For example, this court has held in the case of *Teal v. Walker,* 111 U. S. 242, 28 L. Ed. 415, that if a

state law declares that a mortgage is not a conveyance, then the mortgagee is not entitled to possession prior to foreclosure and the right to the rents and profits remains with the mortgagor. The court there said:

> "For if a mortgage is not a conveyance and the mortgagee is not entitled to possession, his claim to the rents is without support. This is recognized by the Supreme Court of Oregon as the effect of a mortgage in that state . . .
>
> "The case of the defendant in error cannot be aided by the stipulation in the defeasance of Aug. 19, 1874, exacted by the mortgagee that Goldsmith and Teal would upon default in the payment of the note secured by the mortgage deliver to Hewitt the trustee, the possession of the mortgaged premises. That contract was contrary to the public policy of the State of Oregon as expressed in the statute just cited and was not binding upon the mortgagor or his vendee, and although not expressly prohibited by law, yet, like all contracts opposed to the public policy of the state, it cannot be enforced."

Such a legal principle goes to the very nature of the lien of the mortgage. The State of Washington, by Section 7.28.230, of the Revised Code of Washington has declared:

> "A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law."

This declaration of the Washington Legislature determines the nature and scope of a mortgage lien. It is a rule of property. Under a similar statute the Supreme Court of Minnesota in *Nielson v. Heald,*

186 N. W. 299, 26 A.L.R. 29, held that the lien did not include the rents and profits and said:

> "* * * for the rents and profits are not part of the security, and the mortgagee is not entitled to them. * * * the rents and profits form no part of the security acquired under the mortgage, and the mortgagee can reach them only by invoking the equitable powers of the court, and then only to the extent necessary to protect the property from deterioration and from liens arising out of claims which were suffered to accrue after the mortgage was taken, but which, if not paid, will take precedence over the mortgagee."

To the same effect see *Debentures, Inc. v. Zech*, 192 Wash. 339, 73 P. (2d) 1314; and *State ex rel Gwinn, Inc. v. Superior Court*, 170 Wash. 463, 16 P. (2d) 831. Since Congress has prescribed that a mortgage shall be the type of lien commonly existing under state law, (Title 12, Section 1707) the state law must be resorted to, to determine the scope of the lien. If the lien is not broad enough under state law to include rents and profits the federal courts are bound by the state law and cannot extend the mortgagee's lien beyond the scope of the state law.

The Circuit Court of Appeals in this case has indicated that state law will be ignored where the mortgage is insured under a federal program. This leaves *no established body of law* to determine such items generally considered for the protection of mortgage debtors as who has the right to possession prior to foreclosure, how property can be redeemed from foreclosure, what, if any, homestead rights will be recognized, what, if any, exemptions can be allowed mortgagors under deficiency judgments. In respect

to all of these features this court and the federal courts generally have in diversity cases and other cases of federal jurisdiction followed the state law. *Teal v. Walker,* 111 U. S. 242, 28 L. Ed. 415 (Rents and profits during foreclosure); *Brine v. Hartford Fire Insurance Company,* 96 U. S. 627, 24 L. Ed. 858 (Redemption); *Commissioner of Internal Revenue v. Stern,* 357 U. S. 39, 2 L. Ed. (2d) 1126 (Exemptions); *Swift v. Smith,* 102 U. S. 442, 26 L. Ed. 193 (Redemption); *Mason v. Northwestern Mutual Fire Insurance Co.,* 106 U. S. 163, 27 L. Ed. 129; *Orvis v. Powell,* 98 U. S. 176, 25 L. Ed. 238.

The Circuit Court in this case, however, holds that because a general federal program is involved in mortgage insurance that it becomes necessary to apply federal law to the exclusion of state law in the foreclosure of FHA insured mortgages. Federal Courts of other circuits have not held that the mere existence of a nation-wide program carries with it a necessary implication of uniformity to the extent that state law will be disregarded. Thus, in the case of *U. S. v. Kramel,* 234 F. (2d) 577, (8 CCA 1956) the Eighth Circuit Court of Appeals applied entirely different principles to a comparable problem and arrived at an entirely different result from that reached by the Ninth Circuit in this case. The decision of the Circuit Court of Appeals in this case thus presents a *conflict of decisions between circuits.*

In the case of the *United States v. Kramel,* supra, the Farmer's Home Administration held a chattel mortgage on a cow which was sold by a commission dealer who was then sued for conversion by the government. The defense pleaded a Missouri statute exempting marketing agents which did not have

actual knowledge of the mortgage from liability for conversion. In that case, the government made the same contention that it makes here; namely, that since the government had established a nation-wide program that state law must be disregarded in the interest of uniform administration. The Eighth Circuit Court of Appeals rejected that contention, saying:

> "The government contends that by the Farmer's Home Administration Act, 7 U.S.C.A., it entered into nation-wide transactions requiring uniform administration. In many respects, this claim is sound but is that requirement broad enough to avoid entirely all application of state law to every and all situations and contingencies? Setting to one side the question of constitutional power is this act to be construed as displacing state law governing or *affecting titles to property* and toward actions for claimed violation of property rights?
>
> "We have searched through the entire act to ascertain whether expressly or by fair implication any such broad purpose is indicated therein. Clearly there is no direct expression to be found. Nor is there any such intention implied. Broadly this legislation gives aid to designated classes of farmers by providing or insuring loans on farmlands and upon certain chattels connected with farming operations including livestock. * * * This legislation was general in its intention to make or to insure loans in all states. *Congress must have known that state laws affecting or protecting titles and their attributes such as possession for example — are not identical in all the states.* Yet, this legislation omitted any reference to this inevitable situation. From this omission we must conclude that here *Congress did not deem that the complete uniformity* now urged by the government *was necessary* to effectuate the purposes it in-

tended to accomplish by the act. Compare *Reconstruction Finance Corporation v. Beaver County, Pennsylvania,* 328 U. S. 204, 209-210, 66 Sup. Ct. 992, 90 L. Ed. 1172.

"The present action is one in tort for the conversion of a chattel covered by the mortgage. Does this form of action effect the matter of uniformity of administration of this act so as to manifest a congressional intent to remove it from the control of state law? While Trover is a tort proceeding, yet it is an action which is based upon and solely for the protection of a cardinal element of property possession. It is an unlawful appropriation of personal property due to the legal damage of the rightful possessor. We think this character of action cannot be presumed or construed to be within the purvue of this legislation as the matter to be governed by it. There is no element of harmonious administration of the act involved herein. Such remedies are much the same in the different states but this very litigation is illustrative of the existence of differences. There should be substantial if not compelling reasons to warrant construction of an act of Congress as replacing state tort laws affecting property rights. We see none such here.

"What we have hereinbefore stated disposes of the convention that the federal and not the state law prevails because the Farmer's Home Administration Act requires uniformity of administration in situations such as here presented

"The so-called general common law contention is also obviously so included. This is true because such common law is not present where state law prevails. Also, such property rights as here involved are held by this court and other courts to be determined by the state law. While such courts have reached different conclusions

on other related matters, there has been no disagreement as to this." (Emphasis supplied.)

The decision just quoted clearly holds that the mere fact that a nationwide program has been established is not sufficient in itself to obviate resort to state statutes where the incidents of possession, title and rights of property are established by state law. In that case, as in this one, *Congress has not declared any policy to replace state laws* which control the title to real and personal property. The Eighth Circuit Court of Appeals in the case just quoted said:

> "Of course, Section 658 states a clear intention to protect the collateral given the Farmer's Home Administration from conscious fraud. However, this does not go so far as to evince a public federal policy to replace state laws which control title either to real or personal property. Nor does any provision of that act have such an effect. Laying aside any question of constitutional power on the part of the United States so to effect property titles, it would require a very clear expressed intent so to invade the field of control which has always been regarded as pecularily belonging to the states exclusively."

What the court said there is applicable to this case and it would require a clear expression of Congress to cause the courts to lay aside state law as to title and possession to property.

The Federal Housing Administration Act itself clearly contemplates that there will not be uniformity in the several states because in the definition of "mortgage" (Title 12, Sec. 1707, U.S.C.) Congress has expressly stated that a mortgage shall be the classes of first liens, commonly given under the laws

of the state in which the real estate is located. This expression of Congress clearly negatives any inference that it was intended to ignore state law.

The holding of the Circuit Court of Appeals that because there is a nationwide program of mortgage insurance that the rules established by individual states for the protection of mortgagors must be swept aside is not consistent with other holdings of this court. For example, in the case of *Commissioner of Internal Revenue v. Stern,* 357 U. S. 39, 2 L. Ed (2d) 126, this court declined to follow a contention urged by the government that because of the need for uniformity in the application of the federal tax laws, state statutes and policies must be disregarded. The court pointed out that to set up a federal body of decisional law in the narrow field involved would be episodic and said:

> "That effort is plainly not justified when there exists a flexible body of pertinent state law continuously being adapted to changing circumstances affecting all creditors. Accordingly, we hold that until Congress speaks to the contrary, the existence and extent of liability should be determined by state law."

This court in the case just quoted clearly indicated that in the absence of a clear expression of Congress it would not break with the principles established by state law in the matter in which that law was applicable. In the case just cited *Commissioner of Internal Revenue v. Stern,* supra, the court said:

> "Second. The government urges that to further uniformity of liability we reject the applicability of Kentucky law in favor of having the Federal Courts fashion governing rules. Cf. *Clearfield Trust Company v. United States,* 318

U. S. 363, 87 L. Ed. 838. But a federal decisional law in this field displacing state statues, as determinative of liability would be a sharp break with the past."

The court went on to say:

"Uniformity is not always a federal policy. Under Section VII of the Bankruptcy Act for instance, state law is applied to determine what property of the bankrupt has been transferred in fraud of creditors. 30 Stat. 565, as amended 11 U.S.C., Sec. 110. What is a good transfer in one jurisdiction might not be so in another. Since Congress has not manifested a desire for uniformity of liability we think that the creation of a federal decisional law would be inappropriate in these cases. In diversity cases the federal courts must now apply state decisional law in defining state created rights, obligations and liabilities. *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 114 A.L.R. 1487. They would, of course, do so in diversity actions brought by private creditors since the federal courts no longer formulate a body of federal decisional law for the larger field of creditor rights in diversity cases, any such effort in the small field of actions by the government as a creditor would be necessarily episodic. That effort is plainly not justified when there exists a flexible body of pertinent state law continuously being adapted to changing circumstances affecting all creditors. Accordingly, we hold that until Congress speaks to the contrary the existence and extent of liabilities should be determined by state law."

In the matter of determining the *rules of property*, this court has given peculiar recognition to state law. Thus in *Brine v. Hartford Fire Insurance Company*, 96 U. S. 627, 24 L. Ed. 858, the court held that federal courts are bound to recognize state

rules with respect to redemption following mortgage foreclosures and the court said:

> "This right as a condition on which the title passes is as obligatory on the federal courts as on the state courts because in both cases it is made a rule of property by the legislature which has the power to prescribe such a rule."

In the present case, the Circuit Court of Appeals has overlooked the fact that the state statute forbidding possession (and hence the rights to rents and profits prior to foreclosure) establishes a rule of property and affects the title to the rents and profits and the possession of the realty and by the decisions of this court such a rule of property established by the states will be observed in the federal courts in the absence of a clear expression by Congress of an intent to do something else.

A review by the court of the decision of the Circuit Court of Appeals is necessary:

1. To establish the law in respect to a novel contention advanced by the government to the effect that all federally insured mortgages may be foreclosed with sole reference to federal law.

2. To prevent a chaotic situation by referring the courts to a body of federal law which as yet has not been established with regard to the subject of the incidents of federally insured mortgages and the allowable remedies in cases of foreclosures.

3. To resolve the conflict between the Ninth Circuit Court of Appeals in the present case and the Eighth Circuit Court of Appeals in the case of *U. S.*

vs. Kramel, 234 F. (2d) 577 in which the Eighth Circuit declined to apply federal law exclusively in a case involving a mortgage held under a nation-wide federal program.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

VIEW CREST GARDEN APTS., INC.,
A Corporation, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BEFORE: POPE, ORR & HAMLEY, *Circuit Judges.*
ORR, *Circuit Judge*:

Appellee, View Crest Garden Apts., Inc., borrowed money from the National Bank of Commerce of Seattle, hereafter Bank. A mortgage was executed by appellee as mortgagor to the Bank as Mortgagee. Mortgage insurance was agreed to by the Federal Housing Insurance Authority, hereafter FHA, pursuant to its duly constituted authority. The mortgage form used was a printed one formulated by the FHA and contained a provision to the effect that in the event of foreclosure a receiver was to be appointed in order to collect rents which were to be applied as additional payment on the debt. A number of notes, also on printed forms furnished

by the FHA, were executed to secure each installment to be paid.

A default occurred, but was cured by a modification of the agreement between appellee and the FHA, the bank having previously assigned the mortgage to the Federal National Mortgage Association who in turn assigned it to FHA.

A second default occurred on March 15, 1958, whereupon the United States instituted this foreclosure action and in its complaint for foreclosure prayed for the appointment of a receiver to take over the assets and collect the rents.

A hearing was had on the application for the appointment of a receiver. The court denied the application on the ground that inasmuch as the state law of the State of Washington applied, no sufficient showing had been made under the law of said state to warrant such an appointment.

No contention is made by the government that in the event Washington State law applies the trial court was in error in refusing the appointment. The contention is that it erred in applying state law rather than federal law as controlling. We take the view that the government is correct in its contention. In reaching our conclusion we have found that in this case as in others with which we have struggled the solution is not without difficulty. But we do find it to be clear that the course of the law governing the relations between the United States and the parties to the mortgage here involved is federal. *Clearfield Trust Co. Co. v. United States,* 318 U. S. 363; *Alleghany County v. United States,* 322 U. S. 174; *United States v. Matthews,* 244 F. (2d) 626 (9th Cir., 1957); *McKnight v. United States,* 259 F. (2d) 540 (9th Cir., 1958). Cf. *Bank of America v.*

Parnell, 352 U. S. 29. It is therefore equally clear that if the law of the State of Washington is to have any application in the foreclosure proceeding it is not because it applies of its own force, but because either the Congress, the FHA, or the Federal Court adopts the local rule to further federal policy. As it is made certain in the cases just cited, this action arises under federal law, and not as an action between persons of diverse citizenship, hence the rule of *Erie R. Co. v. Tompkins,* 304 U. S. 64, is inapplicable. Nevertheless state law is sometimes adopted to fulfill the federal policies involved. As the Supreme Court of the United States stated in *Clearfield Trust,* supra, "in our choice of the applicable federal rule we have occasionally selected state law." But not "when the desirability of a uniform federal rule is plain." (318 U. S. at 367.)

Appellee argues that the Congress has adopted state law as to the appointment of receivers by its reference to state law in defining mortgages. Section 1707 of 12 U.S.C.A. reads in part: "The term mortgage means * * * and the term 'first mortgage' means such classes of first liens as are commonly given * * * under the laws of the state in which the real estate is located * * *" The argument is that in adopting the state definition of 'first mortgage,' Congress intended to adopt all the incidents of the mortgage relation under state law including remedies on default and the appointment of receivers. That this is not the case is clear from reading Section 1713 of the same Act which defines certain acts as being in default (part g) and sets out certain remedies that the FHA can pursue such as institution of foreclosure (part k) proceedings without reference to whether or not there is such a rem-

edy for the default described in the state where the property is located. Moreover, there is no apparent reason for assuming that Congress in incorporating by reference certain duties under state law also meant to restrict the United States to the state remedies for breach of those duties—as will be discussed in connection with appellees' contention that because FHA uses different mortgage forms for different states, it discloses an intention to conform to local law in all respects.[1]

The separate forms for each state used by the FHA make reference to such things as the recording acts of the state for which the form is designed. A reasonable explanation of both this variation of forms from state to state and the Congressional reference to state law in defining first mortgages is that suggested by the Supreme Court of the United States in *Clearfield Trust* to the effect where it is commercially convenient to adopt state law as the federal rule, and when no federal policy would be impaired, local rules can be effectively utilized. Thus state recording acts interfere with no federal policy as there is no federal recording system for the type of mortgages here involved. It is commercially convenient to adopt existing state systems as is saves the expense of setting up a whole new federal recording system and it enables persons checking ownership interests in property to refer to one set of record books rather than two. Utilizing state definitions of first mortgage liens is convenient in that its terms are familiar to persons in the locale

[1]It is apparent that the FHA did not intend to adopt local law as to when a receiver may be appointed as the mortgage form contains a stipulation setting out when FHA would be entitled to a receiver.

where the lien is created and who will see it on the record books; it interferes with no federal policy since the Act in adopting the state definition of first mortgages as the type required insures that the FHA will have the finest protection of its security interest—that there will be no superior mortgage under local law.

A different set of factors come into play when the planning stage and the working states of the agreement have been terminated. After a default the sole situation presented is one of remedies. Commercial convenience in utilizing local forms and recording devices familiar to the community is no longer a significant factor. Now the federal policy to protect the treasury and to promote the security of federal investment which in turn promotes the prime purpose of the Act—to facilitate the building of homes by the use of federal credit—becomes predominant. Local rules limiting the effectiveness of the remedies available to the United States for breach of a federal duty cannot be adopted.

It is urged that to hold that federal law applies would result in great hardship to mortgagors who would thereby be deprived of all rights under state law such as the right of redemption. We do not think that such a conclusion necessarily follows. A

This court in a very similar case involving veterans' loans insured by the United States held that a local statute prohibiting deficiency judgments could not impair that remedy as far as the mortgage insured by the United States is involved. *U. S. v. McNight*, 259 F. (2d) 540 (9th Cir., 1958).

court confronted with that question could determine it by weighing the federal interest against the particular local policy involved.[1] If the considerations weighed by the court suggest an adoption of local law, such as the local rule on redemption, that could be done. But if on the other hand necessity requires the fashioning of a federal rule, absent a declared federal rule on the subject the federal courts are authorized to and capable of fashioning one. The United States Supreme Court has suggested a starting point for developing federal decisional law in nondiversity cases by pointing to the rules developed by the federal courts in diversity cases before *Erie R. Co. v. Tompkins*, 304 U. S. 64; it stated in *Clearfield Trust* the following:

> "While the federal law merchant, developed for about a century under the regime of *Swift v. Tyson*, 16 Pet. 1, represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions." (318 U. S. at 367.)

This question of the right of redemption is not presently before us. We mention it merely in answer to appellees' argument as to the havoc which would be wrought by our holding that state law does not apply in the aspect of the case before us.

The trial court having found that the showing made was insufficient to warrant the appointment of a receiver under state law and this court being

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[1] Guiding considerations are discussed in Mishkin, The Variousness of "Federal Law": *Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797 (1957).

of the opinion that federal law controls, it is ordered that the case be remanded with instructions to the trial court to make a determination as a matter of federal law whether the facts warrant the appointment of a receiver.

(Endorsed:) Opinion. Filed June 22, 1959.

Paul P. O'Brien, *Clerk*.

APPENDIX B

Title 12 U.S.C. Sec. 1707

Definitions

As used in Section 1709 of this title—

(a) The term "mortgage" means a first mortgage on real estate, in fee simple, or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable or (2) under a lease having a period of not less than fifty years to run from the date the mortgage was executed; and the term "first mortgage" means such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate, under the laws of the state, in which the real estate is located, together with the credit instruments, if any, secured thereby.

APPENDIX C

Title 12 U.S.C. Sec. 1750

Definitions

As used in this subchapter, the terms "mortgage," "first mortgage," "mortgagee," 'mortgagor," "maturity date," and "state" shall have the same meaning as in Section 1707 of this title. June 27, 1934, c. 847, Title IX, § 901, as added Sept. 1, 1951; c. 378, Title II, § 201, 65 Stat. 295.

APPENDIX D

Revised Code of Washington 7.28.230

Mortgagee cannot maintain action for possession.

A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law. (Code 1881, § 546; 1877, p. 114, § 550; 1869, p. 130, § 498; RRS, § 804.)

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Supreme Court, U.S.
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No. 372

In the Supreme Court of the United States

OCTOBER TERM, 1959

VIEW CREST GARDEN APARTMENTS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The oral opinion of the United States District Court for the Western District of Washington (R. 53–56) is not reported. The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1A–7A) is reported at 268 F. 2d 380.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1959 (R. 69). The petition for a writ of certiorari was filed on September 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether, in an action by the United States to foreclose a national defense housing insured mortgage, federal law governs the right of the United States to enforce an express provision of the mortgage for the appointment of a receiver of the rents of the mortgaged property.

STATUTES, REGULATIONS, AND MORTGAGE PROVISIONS INVOLVED

The relevant statutes, regulations, and mortgage provisions involved are set forth in the Appendix, *infra*, pp. 13–18.

STATEMENT

This is a suit brought by the United States to foreclose a national defense housing mortgage insured by the United States, acting through the Federal Housing Administration (FHA), under the authority of Section 908 of Title IX of the National Housing Act, 12 U.S.C. 1750g, Appendix, *infra*, p. 16.

The national defense housing mortgage program.—Title IX, 12 U.S.C. 1750, *et seq.*, was added to the Act in 1951. It was designed to supplement the programs of mortgage insurance, which had been previously established in other titles of the Act, by providing for the insurance of "national defense housing * * * mortgages" (12 U.S.C. 1750a), "in order to assist in providing adequate housing in areas which the President * * * shall have determined to be critical defense housing areas." (12 U.S.C. 1750b.)

Title IX, and the regulations (24 C.F.R. 297) adopted by the Federal Housing Commissioner under authority of Section 907, 12 U.S.C. 1750f,[1] set forth the procedure which must be followed in order to obtain insurance on national defense housing mortgages. First, the mortgagee (who must have previously been approved by the FHA) and the sponsors of the project to be financed by the mortgage must submit an "application for mortgage insurance" on an approved FHA form, giving information required by FHA respecting the project.[2] On approval of the application, FHA issues a "commitment" of insurance, setting forth the terms and conditions under which the obligation secured by the mortgage will be insured.[3] The mortgage agreement then must be executed on a printed form approved by the Commissioner; no changes in the written form may be made without his prior written approval.[4] If the mortgage meets the terms and conditions set forth in the commitment, it is accepted for insurance.

Under the agreement of insurance between the mortgagee and FHA, the mortgagee, in the event of default, becomes entitled to payment of insurance benefits if it either (1) transfers the mortgage to FHA or (2) obtains title to the mortgaged property

[1] These regulations, with exceptions not pertinent here, incorporate by reference the eligibility requirements and procedures for mortgages to be insured under Section 207 of the National Housing Act, 12 U.S.C. 1713. See 24 C.F.R. §§ 232, 233.

[2] 24 C.F.R. 232.1(a).

[3] 12 U.S.C. 1750b, 24 C.F.R. 232.2(a).

[4] 24 C.F.R. 232.3.

by foreclosure or otherwise, and transfers the title to FHA.[1] If the mortgage itself is transferred, FHA is authorized to institute foreclosure proceedings and to exercise all the rights of the mortgagee under the mortgage.[2]

The facts of this case.—A typical national defense housing insured mortgage was executed between the petitioner, View Crest Garden Apartments, Inc., as mortgagor, and the National Bank of Commerce of Seattle, as mortgagee (R. 5–6). The accompanying promissory note was executed by the petitioner in favor of the Bank (R. 5). Both the mortgage and the note were executed on printed FHA forms (R. 64). The printed portion of the mortgage expressly provided that, in the event of default, the mortgagee, in any action to foreclose, would be entitled to the appointment of a receiver to collect the rents from the mortgaged premises which become due during the pendency of a foreclosure suit, and which were to be applied as additional payment on the debt (R. 6–8, 64).

On April 16, 1953, the Bank assigned the note and mortgage to the Federal National Mortgage Association (R. 9). The petitioner subsequently defaulted, and on August 7, 1956, FNMA assigned the note to FHA (R. 10–11). FHA paid the accelerated unpaid balance (R. 10), and entered into a modification agreement with the mortgagor to cure the first default (R. 11). Thereafter, another default occurred (R. 15). On March 18, 1958, when the United States

[1] 12 U.S.C. 1713(g).
[2] 12 U.S.C. 1713(k).

instituted this foreclosure action, the mortgagor was in default in an amount exceeding $1,950,000 (R. 40–41). An independent appraisal report has set the value of the property at $762,000, indicating a deficiency at foreclosure of more than $1,000,000.[1]

In its complaint in the foreclosure suit, the Government sought, *inter alia*, the appointment of a receiver in accordance with the express terms of the mortgage (R. 18). However, the district court denied the Government's application on the ground that under Washington law, which it deemed controlling, an insufficient showing had been made to warrant appointment of a receiver (R. 51–52). Pursuant to the provisions of 28 U.S.C. 1292(b), the Government was permitted by the court of appeals to take an interlocutory appeal from this order (R. 60).

On appeal, the Ninth Circuit found it "clear that the *source* of the law governing the relations between the United States and the parties to the mortgage here involved is federal" (R. 65). The court further held that it would be inappropriate, in fashioning a federal rule to govern the remedies of the United States in connection with the protection of its security interests under the National Housing Act, to adopt local rules which would limit the effectiveness of those remedies (R. 67).

The case was remanded to the district court with instructions to determine whether, under federal law, the facts warrant the appointment of a receiver (R. 69).

[1] The appraiser's report was part of the record on appeal and has been filed with this Court by the respondent.

ARGUMENT

The court of appeals held that the Government's right to the appointment of a receiver pursuant to the express terms of a national defense housing insured mortgage is to be determined by reference to federal rather than state law. The decision of the court below is plainly correct, is in full accord with the governing decisions of this Court and, contrary to petitioners' assertions, is neither inconsistent nor in conflict with any other court decision. Accordingly, further review by this Court is unnecessary.

1. This Court has consistently recognized that where the United States, acting pursuant to the Constitution or Acts of Congress, enters into transactions on a large scale that require uniform administration, questions of federal rights and liabilities must be determined by reference to federal law. *Clearfield Trust Co.* v. *United States*, 318 U.S. 363; *United States* v. *Allegheny County*, 322 U.S. 174; *United States* v. *Standard Oil Co.*, 332 U.S. 301; cf. *Bank of America* v. *Parnell*, 352 U.S. 29.[8]

[8] Thus, in *Clearfield*, *supra*, state law was held inapplicable in an action by the United States on a check issued by the United States Treasury. "The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain." (318 U.S. at 367.)

United States v. *Allegheny County*, *supra*, represented an extension of *Clearfield* to cover all cases involving contracts entered into by the United States. "The validity and construc-

The court below correctly applied this settled principle in holding that federal law determines the Government's right to appointment of a receiver in connection with foreclosure of a national defense housing insured mortgage which specifically authorized such appointment. The FHA in insuring such mortgages is carrying out an important part of the nationwide program of mortgage insurance authorized by the National Housing Act. The particular standard mortgage provision here involved, which gives the FHA the right to receive, as additional security for the mortgage, the rents coming due during the foreclosure proceedings, was designed to preserve the $10,000,000 National Defense Housing Insurance Fund (12 U.S.C. 1750a). We submit that the "desirability of a uniform rule [to make such security effective] is plain" (*Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367). For otherwise the extent to which the Government could realize on such security would vary from state to state, even though the same mortgage provision was involved. Indeed, if the Government's right to a receiver were to depend upon "vagaries of the laws of the several states" (*Clearfield* case, *supra*, p. 367), the result might be that projects in certain

tion of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State." (322 U.S. at 183.)

And, in *United States* v. *Standard Oil Co.*, *supra*, the Court made clear that questions involving federal fiscal policy, require "uniform national treatment rather than diversified local disposition" (332 U.S. at 311), and were therefore determinable by reference to federal law.

states, which otherwise met the requirements of the national defense housing mortgage program, would be rejected because of lack of adequate security."

2. There is no merit to petitioners' contention (Pet. 5–6, 12–13) that because Section 201 of the National Housing Act (12 U.S.C. 1707, *infra*, p. 13) defines the term "first mortgage" as "such classes of first liens as are commonly given * * * under the laws of the State in which the real estate is located," Congress thereby evidenced an intention that all of the rights of the Government with respect to its mortgage interests should be determined by state law. The definition of "first mortgage" in Section 201 was taken from Section 2 of the Federal Home Loan Bank Act, 12 U.S.C. 1422. The legislative history of the latter Act indicates that the reference to state law in the definition of first mortgages was intended to insure that all mortgage-type incumbrances on real estate, not junior to any prior lien, would be included within the category, whether denominated as "trust deeds" or as "liens" by state law. See 75 Cong. Rec. 14553–54, 14560–61. As the court below pointed out (R. 66–67):

> Utilizing state definitions of first mortgage liens is convenient in that its terms are familiar to persons in the locale where the lien is created

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[2] Petitioners' reliance upon *Brine* v. *Hartford Fire Insurance Co.*, 96 U.S. 627, for the proposition that "this court has given peculiar recognition to state law" in matters dealing with "rules of property" (Pet. 14) is plainly inapposite. *Brine* was an ordinary foreclosure proceeding between private parties in which neither the Government, nor a government program, was involved.

and who will see it on the record books; it interferes with no federal policy since the Act in adopting the state definition of first mortgages as the type required insures that the FHA will have the finest protection of its security interest—that there will be no superior mortgage under local law.

Section 1713 of the National Housing Act (*infra*, pp. 13–15) further shows that Congress did not intend, by resorting to state law for the definition of first mortgage, to make the Government's right to foreclosure its security dependent upon state law. Section 1713(g) enumerates certain acts which constitute a default, and Section 1713(k) provides various remedies that the FHA can pursue, including the institution of foreclosure proceedings. There is no indication, however, that the right to obtain foreclosure is to be dependent upon state law. The legislative history of the Act shows that Congress intended FHA to have authority to require whatever mortgage terms it deems necessary for the protection of the Government's financial interest.[1] As we have shown, the Government would not be adequately protected if its

[1] In explaining the bill on the floor of the Senate, Senator Fletcher said (78 Cong. Rec. 11974):

"In connection with the mutual mortgage insurance program provided for in title II, mortgages which are offered to the administrator within 1 year from the date of their execution are to be eligible for insurance *if they* are amortized and *comply with such further requirements as the administrator may prescribe with respect to* maturities, the application of periodic payments to the amortization of principal, and provisions with respect to insurance, repairs, alterations, payment of taxes, default reserves, delinquency charges, *foreclosure proceedings*, anticipation of maturity, additional and secondary liens, and other similar matters. * * *" (Emphasis added.)

right to foreclosure depended upon compliance with the varying provisions of local law.

3. Contrary to petitioners' contention (Pet. 9–12, 15–16), the decision below is not in conflict with *United States* v. *Kramel*, 234 F. 2d 577 (C.A. 8). There a farmer had executed a chattel mortgage in favor of the Farmers' Home Administration as security for a loan to him by the Administration. The mortgage contained a provision that the mortgagor was not to sell any of the mortgaged property without consent of the mortgagee. Without obtaining the consent of the Administration, however, the farmer-mortgagor sold the mortgaged property through a commission merchant. (The latter apparently, did not know that such consent was required.) The United States sued the merchant for conversion; one defense was that under state law the merchant had not committed conversion. The Eighth Circuit held that the Government's right to recover for the tort of conversion was to be determined by state rather than by federal law.

The instant case, however, involves a different statute, and is a foreclosure proceeding rather than a tort suit for damages. The considerations which led to the holding in *Kramel* that, under the program there involved, state law governed the determination whether a person through whom mortgaged property was sold without the Government's consent converted such property are not dispositive of the question whether, under another program, the Government's right to obtain a receiver is a question of federal law. *Kramel* itself recognized that whether federal law applies "is a matter of inclusion or exclusion governed by

the intent (express or implied) of Congress as suited to the situation *in the particular case*" (p. 580, emphasis added). Any doubt that *Kramel* is limited to the issue there presented (under the Farmers' Home Administration Act) is dispelled by two subsequent decisions of the Eighth Circuit which held that, under other statutes, questions as to the Government's security rights were to be determined by federal law.[11]

Petitioners also assert (Pet. 13) that the decision below is "not consistent" with *Commissioner* v. *Stern*, 357 U.S. 39. There this Court held that whether a beneficiary of life insurance was liable (under Section 311 of the Internal Revenue Code of 1939) for the deceased insured's income tax deficiencies depended on state rather than federal law. The holding is plainly inapplicable to the different issue in this case, namely, whether federal law governs the rights of the United States to obtain a receiver in order to protect its security interests under a federally insured mortgage, where the mortgagor specifically agreed to such appointment. Cf. *McNight* v. *United States*, 259 F. 2d 540 (C.A. 9).

3. Petitioners see far-reaching implications in the decision below, namely, that mortgagors would be

[11] In *United States* v. *LaTrobe Construction Co.*, 246 F. 2d 357, certiorari denied, 355 U.S. 890, the Eighth Circuit held that the Government's rights under mortgages given as security for funds advanced pursuant to the Defense Production Act of 1950, 50 U.S.C. App. 2061, *et seq.* were, in accord with *Clearfield* principles, determinable by reference to federal law. In *United States* v. *McCabe Co.*, 251 F. 2d 539, it held that federal law was the proper source of reference in determining the rights of the United States arising under liens acquired in the conduct of the Commodity Credit Corporation price support program.

denied state-created redemption rights (Pet. 6, 8).[12] As the court below correctly ruled (R. 67), however, this case presents no issue with respect to the mortgagor's right of redemption. It presents only the narrow question whether the right of the FHA to the appointment of a receiver, pursuant to a specific provision of a federally insured mortgage, is to be determined by state or federal law. As we have shown, the holding of the Court of Appeals that federal law governs that question is correct, and there is no occasion for further review by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1959.

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[12] Petitioners' concern (Pet. 5) that the decision below would require the "federal courts to now evolve an independent federal common law to govern [federally-insured] mortgages," ignores the fact that there already is substantial federal decisional law dealing with the enforceability of mortgage provisions relating to the appointment of a receiver. See, *e.g.*, *Freedman's Saving and Trust Co.* v. *Shepherd*, 127 U.S. 494, 502; *Mortgage Loan Co.* v. *Livingston*, 45 F. 2d 28, 31-32 (C.A. 8); *Associated Co.* v. *Greenhut*, 66 F. 2d 428, 429 (C.A. 3); *McNamara* v. *Hart*, 83 F. 2d 649, 652 (C.A. 8); *Tower Grove Bank & Trust Co.* v. *Weinstein*, 119 F. 2d 120, 122 (C.A. 8).

APPENDIX

STATUTES, REGULATIONS, AND MORTGAGE PROVISIONS INVOLVED

1. The National Housing Act, 48 Stat. 1246, as amended, 12 U.S.C. 1702, *et seq.*, provides in pertinent part (as it appears in the United States Code):

§ 1707. Definitions.

As used in section 1709 of this title—

(a) The term "mortgage" means a first mortgage on real estate, in fee simple, or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable, or (2) under a lease having a period of not less than fifty years to run from the date the mortgage was executed; and the term "first mortgage" means such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate, under the laws of the State, in which the real estate is located, together with the credit instruments, if any, secured thereby.

* * * * *

§ 1713(g). The failure of the mortgagor to make any payment due under or provided to be paid by the terms of a mortgage insured under this section shall be considered a default under such mortgage and, if such default continues for a period of thirty days, the mortgagee shall be entitled to receive the benefits of the insurance as hereinafter provided, upon assignment, transfer, and delivery to the Commissioner, within a period and in accordance with rules and regulations to be prescribed by the Commissioner of (1) all rights and interests arising under the mortgage so in default; (2) all

claims of the mortgagee against the mortgagor or others, arising out of the mortgage transactions; * * * *Provided,* That the mortgagee in the event of a default under the mortgage may, at its option and in accordance with regulations of, and in a period to be determined by, the Commissioner, proceed to foreclose on and obtain possession of or otherwise acquire such property from the mortgagor after default, and receive the benefits of the insurance as herein provided, upon (1) the prompt conveyance to the Commissioner of title to the property which meets the requirements of the rules and regulations of the Commissioner in force at the time the mortgage was insured and which is evidenced in the manner prescribed by such rules and regulations, and (2) the assignment to him of all claims of the mortgagee against the mortgagor or others, arising out of the mortgage transaction or foreclosure proceedings, except such claims that may have been released with the consent of the Commissioner. * * *

* * * * *

§ 1713(k). The Commissioner is authorized either to (1) acquire possession of and title to any property, covered by a mortgage insured under this section and assigned to him, by voluntary conveyance in extinguishment of the mortgage indebtedness, or (2) institute proceedings for foreclosure on the property covered by any such insured mortgage and prosecute such proceedings to conclusion. The Commissioner shall so acquire possession of and title to the property by voluntary conveyance or institute foreclosure proceedings as provided in this section within a period of one year from the date on which any such mortgage becomes in default under its terms or under the regulations prescribed by the Commissioner: *Provided,* That the foregoing provisions shall not be construed in any manner to limit the power

of the Commissioner to foreclose on the mortgaged property after the expiration of such period, or the right of the mortgagor to reinstate the mortgage by the payment, prior to the expiration of such period, of all delinquencies thereunder. * * * Pending such acquisition by voluntary conveyance or by foreclosure, the Commissioner is authorized, with respect to any mortgage assigned to him under the provisions of subsection (g) of this section, to exercise all the rights of a mortgagee under such mortgage, including the right to sell such mortgage, and to take such action and advance such sums as may be necessary to preserve or protect the lien of such mortgage.

* * * * *

§ 1750a. There is created a National Defense Housing Insurance Fund which shall be used by the Commissioner as a revolving fund for carrying out the provisions of this subchapter, and mortgages insured under this subchapter shall be known and referred to as "national defense housing insured mortgages". The Commissioner is authorized and directed to transfer to such fund the sum of $10,000,000 from the War Housing Insurance Fund established pursuant to the provisions of section 1737 of this title. * * *

§ 1750b. (a) This subchapter is designed to supplement systems of mortgage insurance under other provisions of this chapter in order to assist in providing adequate housing in areas which the President, pursuant to section 1591 of Title 42, shall have determined to be critical defense housing areas. The Commissioner is authorized, upon application by the mortgagee, to insure under this section or section 1750g of this title as hereinafter provided any mortgage which is eligible for insurance as hereinafter provided and upon such terms as the Commissioner may prescribe to make com-

mitments for the insuring of such mortgages prior to the date of their execution or disbursement thereon: * * *

* * * * *

§ 1750f. The Commissioner is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this subchapter.

§ 1750g. (a) In addition to mortgages insured under section 1750b of this title, the Commissioner is authorized to insure mortgages as defined in section 1750 of this title * * * which are eligible for insurance as hereinafter provided.

(b) To be eligible for insurance under this section a mortgage shall meet the following conditions:

(1) The mortgaged property shall be held by a mortgagor approved by the Commissioner. * * *

* * * * *

(f) The provisions of subsections (k) and (*l*) of section 1713 of this title shall be applicable to mortgages insured under this section and to property acquired by the Commissioner hereunder, except that as applied to such mortgages and property (1) all references in such subsections to the "Housing Fund" shall be construed to refer to the National Defense Housing Insurance Fund, and (2) the reference therein to "subsection (g)" shall be construed to refer to subsection (c) of this section.

2. 24 C.F.R. 232.1 provides in pertinent part:

Information for preliminary examination. (a) Information required for the examination of a Rental Housing Project under section 207 shall be submitted in the form of an application for mortgage insurance by an approved mortgagee and by the sponsors of such project through the local Federal Housing Administra-

tion office, on approved FHA Application Form (executed in triplicate). No application will be considered unless the exhibits called for by such form are furnished and a fee of $1.50 per thousand of the face amount of the mortgage loan applied for (referred to as "application fee") is paid.

3. 24 C.F.R. 232.2 provides in pertinent part:

> *Issuance of commitment.* (a) Upon approval of an application a commitment will be issued setting forth the terms and conditions upon which the mortgage will be insured, including special requirements applicable to the project and requiring the submission in final form within a time specified of all appropriate documents, drawings, plans, specifications, and other instruments evidencing full compliance satisfactory to the Commissioner with the provisions of this part and with such terms and conditions.

4. 24 C.F.R. 232.3 provides in pertinent part:

> *Mortgage forms.* The mortgage must be executed upon a printed form approved by the Commissioner for use in the jurisdiction in which the property covered by the mortgage is situated, by a mortgagor with the qualifications hereinafter provided in the part * * *. Any changes in the printed form desired by the mortgagor and mortgagee must receive prior written approval of the Commissioner. * * *

5. The pertinent provisions of the national defense housing insured mortgage involved in this case (FHA Form No. 8189–d), are as follows:

> That if there is any default, regardless of whether or not the Mortgagee elects to foreclose this mortgage, the Mortgagee may collect all rents which may become due on the above property, deduct therefrom any necessary operating expenses and five per centum (5%) of the gross

rents collected as compensation for making the collections, and apply the remainder on the balance due on the mortgage.

* * * * *

That the holder of this mortgage, in any action to foreclose, shall be entitled to the appointment of a receiver of the rents and profits of the mortgaged premises as a matter of right and without notice, with power to collect the rents, issues, and profits of said mortgaged premises, due and becoming due during the pendency of such foreclosure suit, such rents and profits being hereby expressly assigned and pledged as additional security for the payment of the indebtedness secured by this mortgage, without regard to the value of the mortgaged premises or the solvency of any person or persons liable for the payment of the mortgage indebtedness. The Mortgagor for himself and any subsequent owner hereby waives any and all defenses to the application for a receiver as above and hereby specifically consents to such appointment without notice, but nothing herein contained is to be construed to deprive the holder of the mortgage of any other right, remedy, or privilege it may now have under the law to have a receiver appointed.

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